

REMARKS

Entry of the *Amendment* filed March 5, 2004 in this application is considered completed in any event in connection with the filing of this *Amendment* filed and with the accompanying *Request for Continued Examination Under 37 CFR 1.114*.

The interview of March 9, 2004 is gratefully acknowledged. Following is a summary of the reasons advanced for allowance at that interview.

Claim 1 was rejected as obvious over United States Patent No. 5,377,860 to *Littlejohn et al.* in view of United States Patent No. 5,269,430 to *Schlaupitz et al.* These references do not suggest an internal retaining shelf extending laterally at the lower extremity of a sidewall recess as is claimed in Claim 1. So much is plain when comparing Figure 7 of the present application to Figure 7 of *Littlejohn et al.* '860 and Figure 4 of *Schlaupitz et al.*:

Figure 7 of present application

FIG. 7

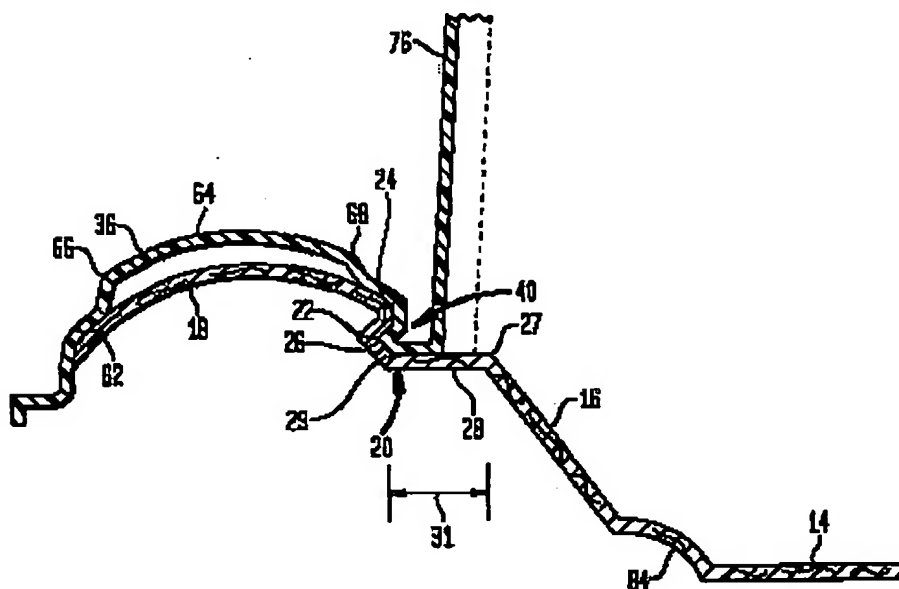


Figure 7 of Littlejohn et al.'860

FIG. 7

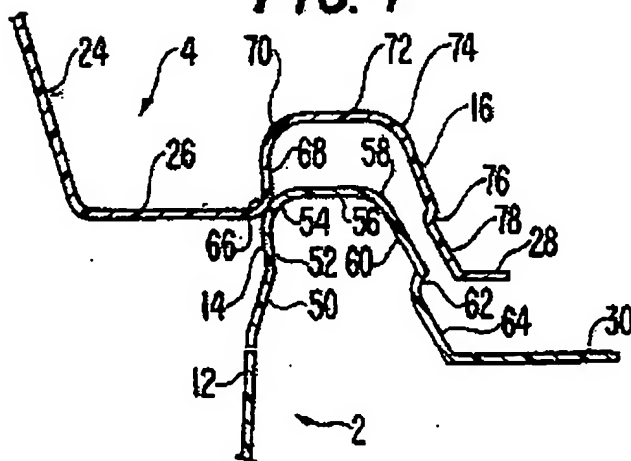


Figure 4 of Schlaupitz et al:

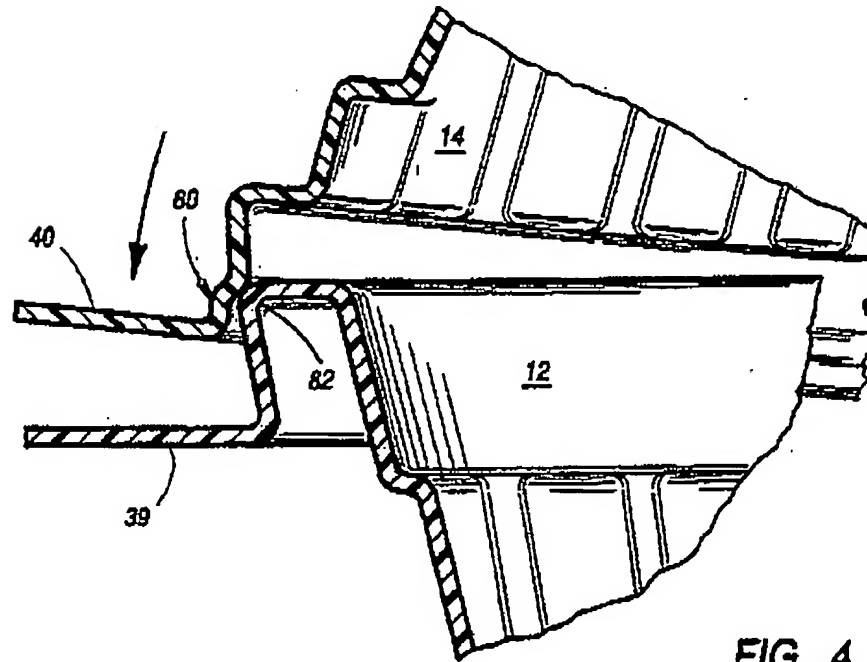


FIG. 4

The reference also fails to suggest a base sidewall recess as appears in Figure 7 of the present application and in Claim 1. At the very least, the recitation of a recess requires a separately identifiable area in the sidewall as is seen from the *Webster's* definition:

re·cess (ri ses/E, rVÆses), *n.*

1. temporary withdrawal or cessation from the usual work or activity.
2. a period of such withdrawal.
3. a receding part or space, as a bay or alcove in a room.
4. an indentation in a line or extent of coast, hills, forest, etc.
5. recesses, a secluded or inner area or part: *in the recesses of the palace.* —*v.t.*
6. to place or set in a recess.
7. to set or form as or like a recess; make a recess or recesses in: *to recess a wall.*
8. to suspend or defer for a recess: *to recess the Senate.* —*v.i.*
9. to take a recess.

The substance of the Examiner's art rejection of Claim 1 is that it is obvious to place shelf 82 of *Schlaupitz et al.* '430 below shelf 52 of *Littlejohn et al.* '860 to arrive at the invention. That position is untenable for the following reason: there is no need whatsoever in *Littlejohn et al.* '860 for a shelf below sealing area at 52 because there is a shelf at 54. Indeed, the Examiner's hypothetical construction results in a superfluous structure which obstructs the interior of the container. The rejection is based on hindsight only.

It is further noted that the mere presence of claim elements in the art does not support an obviousness rejection. MPEP provides that there must be appropriate motivation provided to combine those elements as claimed:

2143.01 Suggestion or Motivation to Modify the References

THE PRIOR ART MUST SUGGEST THE DESIRABILITY OF THE CLAIMED INVENTION

"There are three possible sources for a motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art." *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998) (The combination of the references taught every element of the claimed invention, however without a motivation to combine, a rejection based on a *prima facie* case of obvious was held improper). The level of skill in the art cannot be relied upon to provide the suggestion to combine references. *Al-Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999).

"In determining the propriety of the Patent Office case for obviousness in the first instance, it is necessary to ascertain whether or not the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the reference before him to make the proposed substitution, combination, or other modification." *In re Linter*, 458 F.2d 1013, 1016, 173 USPQ560, 562 (CCPA 1972).

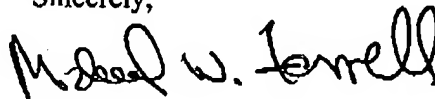
Even if one combined *Schlaupitz et al.* '430 and *Littlejohn et al.* '860 as suggested by the Examiner, there is still no base stop ridge at the top of the sidewall recess of the base in the hypothetical combination as appears in Claim 1, element (a)(i). The rejection should accordingly be withdrawn.

Claim 53 and its dependent claims are likewise believed allowable. Claim 53 was rejected only as obvious over a proposed combination of four references, none of which suggest an inwardly convex annular base stacking recess as is recited in Claim 53 (84 in Figure 7 of the present application, reproduced above).

New Claim 84 recites that the base outer flange portion defines a continuous arc from the sealing recess in the sidewall to the outer edge of the container. Support for this addition recitation appears in Figure 7 above of the application as filed. The art of record does not remotely suggest the structure recited in Claim 84 which is accordingly believed most clearly allowable.

This *Amendment* is being filed with a *Request for Continued Examination Under 37 CFR 1.114*. If additional extensions or fees, including fees for new claims are necessary, please consider this a *Petition* therefore and charge any fees to Deposit Account No. 50-0935.

Sincerely,



Michael W. Ferrell
Attorney for Applicants
Reg. No. 31,158

Ferrells, PLLC
P.O. Box 312
Clifton, Virginia 20124-1706
Telephone: 703-968-8600
Facsimile: 703-968-5500
March 10, 2004